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Wheels Transportation Services, Inc.; Gleb Glinka, Trustee in Bankruptcy and International Brotherhood of Teamsters, Local 597, AFL-CIO. Case 1–CA–40832

November 28, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the complaint.² Upon a charge and an amended charge filed by the Union on April 10 and June 18, 2003, respectively,³ the General Counsel issued the complaint on June 24, 2003, alleging that the Respondent has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On October 24, 2003, the General Counsel filed a Motion for Summary Judgment with the Board. On October 29, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent

¹ The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

² The complaint refers to Wheels Transportation Services, Inc. as "the Respondent," and alleges that Gleb Glinka has been designated as the bankruptcy trustee of the Respondent Company with full authority to continue its operations. However, the caption in the complaint and motion for default judgment names trustee Glinka as the Respondent. Further, the motion for default judgment refers to trustee Glinka as "the Respondent" in describing service of the complaint. See discussion, *infra*, at fn. 4. The Board has historically considered a bankruptcy trustee having authority to continue the business to be an alter ego of the company that existed before the bankruptcy petition was filed. See, e.g., *Waterbury Hotel Management*, 333 NLRB 482, 487 fn. 5, and 554 (2001), *enfd.* 314 F.3d 645 (D.C. Cir. 2003); *Airport Limousine Service* 231 NLRB 932 (1977); and *Marion Simcox, Trustee*, 178 NLRB 516 (1969). See also *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (debtor-in-possession is the same "entity" which existed before the bankruptcy petition). Thus, it is apparent from the circumstances that the General Counsel is alleging that both the Company and the bankruptcy trustee are "the Respondent." We shall therefore refer to them both as the Respondent herein, and have modified the caption accordingly.

³ The amended charge was essentially identical to the original charge, except that it also named bankruptcy trustee Glinka. The original charge, which named only Wheels Transportation Services, Inc. and was served on the Company by certified mail, was returned marked "Refused." However, a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *I.C.E. Electric, Inc.*, 339 NLRB No. 36, slip op. at 1, fn. 2 (2003), and cases cited there.

filed no response. The allegations in the motion are therefore undisputed.⁴

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was filed by July 8, 2003, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated August 6, 2003, notified Respondent's counsel that unless an answer was received by August 20, 2003, a motion for default judgment would be filed.⁵

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.⁶

On the entire record, the Board makes the following

Findings of Fact

I. JURISDICTION

At all material times, Wheels Transportation Services, Inc., a nonprofit corporation with an office and place of business in Berlin, Vermont, has been engaged in providing public transportation services in Washington County, Vermont.

⁴ The amended charge, complaint, and Notice to Show Cause were not separately served on Wheels Transportation Services (which, as noted above, had previously refused service of the original charge). However, the amended charge, complaint, and Notice to Show Cause were properly served on bankruptcy trustee Glinka, as well as the Company's counsel of record, Richard Scholes. As noted above, the Board has treated a bankruptcy trustee with authority to operate the business as the alter ego of the debtor employer. Accordingly, we find that service on trustee Glinka and the Company's counsel of record was sufficient. See *Somerville Construction Co.*, 338 NLRB No. 182, slip op. at 1, fn. 2 (2003) (where two companies are alter egos, it is well established that service on one company is sufficient to constitute service on the other).

⁵ There is no indication that a similar reminder letter was sent to the Company or Trustee Glinka. However, we find that this does not warrant denial of the motion for default judgment. See, e.g., *T-3 Group, Ltd.*, 339 NLRB No. 94, slip op. at 1 fn. 2 (2003); *Superior Industries*, 289 NLRB 834, 835 fn. 13 (1988).

⁶ It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See *id.*; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

Annually, in conducting its business operations described above, Wheels Transportation Services derives gross revenues in excess of \$250,000, and purchases and receives at its Berlin facility goods valued in excess of \$5000 directly from points outside the State of Vermont.

Since about April 23, 2003, Gleb Glinka has been duly designated by the United States Bankruptcy Court, District of Vermont, as the trustee in bankruptcy of Wheels Transportation Services, with full authority to continue the Company's operations and to exercise all powers necessary to the administration of the business.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that International Brotherhood of Teamsters, Local 597, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Donna Bates held the position of the Respondent's executive director, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees who drive the Respondent's vans and buses, mechanical work now assigned to unit employees, pre/post trip cleaning of buses/vans, and incidental cleaning relating to each employee's work area, but excluding primary maintenance and cleaning duties relating to the buildings and grounds currently performed under separate contract, all other employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

Since at least 1995, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit, and since that date the Union has been recognized as such representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from January 2, 2002, to December 31, 2003.

At all times since at least 1995, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On about April 7, 2003, the Respondent closed its Berlin facility, ceased its operations, and laid off all its unit employees.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of the unit employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the Respondent's decision to close its Berlin, Vermont facility and lay off all of the unit employees, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. Because of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation*

Corp., 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).⁷

Thus, the Respondent shall pay the laid-off unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date they were laid off to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, because the Respondent's Berlin, Vermont facility has closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of any unit employees who were employed by the Respondent on or after April 7, 2003, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Wheels Transportation Services, Inc.; Gleb Glinka, Trustee in Bankruptcy, Berlin, Vermont, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Brotherhood of Teamsters, Local 597, AFL-CIO, as the exclusive collective-bargaining representative of employees in the unit set forth below, concerning the effects on the unit employees of its decision to close its Berlin, Vermont facility and lay off all the unit employees. The bargaining unit is:

All full-time and regular part-time employees who drive the Respondent's vans and buses, mechanical work now assigned to unit employees, pre/post trip cleaning of buses/vans, and incidental cleaning relating to each employee's work area, but excluding primary maintenance and cleaning duties relating to the buildings and grounds currently performed under separate contract, all other employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the effects on the unit employees of the Respondent's decision to close its Berlin, Vermont facility and lay off all the unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay to the unit employees their normal wages for the period set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"⁸ to the Union and any unit employees who were employed by the Respondent on or after April 7, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 28, 2003

⁷ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Wilma B. Liebman,	Member
Peter C. Schaumber,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with International Brotherhood of Team-

sters, Local 597, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the following unit, concerning the effects on the unit employees of our decision to close our Berlin, Vermont facility and lay off all the unit employees. The bargaining unit is:

All full-time and regular part-time employees who drive our vans and buses, mechanical work now assigned to unit employees, pre/post trip cleaning of buses/vans, and incidental cleaning relating to each employee's work area, but excluding primary maintenance and cleaning duties relating to the buildings and grounds currently performed under separate contract, all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects on unit employees of our decision to close our Berlin, Vermont facility and lay off all the unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay unit employees limited backpay in connection with our failure to bargain over the effects of our decision to close the Berlin, Vermont facility and lay off all the unit employees, as required by the Decision and Order of the National Labor Relations Board.

WHEELS TRANSPORTATION SERVICES, INC.;
GLEB GLINKA, TRUSTEE IN BANKRUPTCY